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ALERT

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The New York Paid Family Leave Benefits Law

The New York Paid Family Leave Benefits Law ("PFL") takes effect on January 1, 2018. While nine months might seem far away, employers should take steps now to educate themselves about the intricacies of PFL, revise existing leave policies and employment agreements, research PFL insurance coverage plans, and develop procedures to deal with the foreseeable costs and disruption PFL will have on established business operations.

An Overview of the Law

PFL requires almost all New York employers, *regardless of size*, to provide eligible employees with 12 weeks of *paid* leave to engage in "family care," namely, to care for a child following birth, adoption or foster care placement; provide physical or psychological care for a family member suffering a serious health condition; or to engage in certain permitted activities when a family member is on, or called to, active duty in the armed forces of the United States. New York State will be phasing in the benefits afforded under PFL over the course of four years.

Are All Employees Entitled to Paid Leave?

PFL is extremely inclusive and arguably provides leave benefits to more employees than any prior state law. Under PFL, an individual who is employed full-time (for at least 26 consecutive weeks) or part-time (for at least 175 days) is eligible to receive 12 weeks of paid leave with few exceptions[1] ("Eligible Employee"). Unlike the federal Family Medical Leave Act ("FMLA") which requires companies with 50 or more employees to provide unpaid leave to certain employees (those who have worked 1,250 hours within 12 months preceding the leave), PFL regulates small and large businesses alike and enables employees to secure leave benefits after working for much less time. While a worker does not need to be a U.S. citizen or even a documented worker to receive paid leave (citizenship and immigration status appear to be irrelevant under PFL), he/she must be an employee, as opposed to an independent contractor.

There are three scenarios where an Eligible Employee can secure paid leave. First, an Eligible Employee is entitled to paid leave *during* the first 12 months *following* the birth, adoption, or fostering of a child. An employee cannot obtain leave under PFL based on prenatal conditions. The rationale behind this parameter is that PFL exists to enable employees to care for family members in need without sacrificing their job or monetary savings in the interim. PFL is intended

[1] The following employees are *ineligible* for paid leave: employees receiving total disability payments under workers' compensation, volunteer firefighters' benefits, or ambulance workers' benefits; employees on administrative leave; employees receiving sick pay or paid time off; and farm laborers. Public employees are only eligible for paid leave if their employer opts into the coverage while public employees represented by a union are only eligible if paid leave is provided for in a collective bargaining agreement.

to complement, not supplant, current disability laws. Second, an Eligible Employee is entitled to paid leave to care for a child, spouse, domestic partner, parent, grandchild, grandparent, or parent of a spouse or domestic partner who is experiencing a "serious health condition." A "serious health condition" is defined as "an illness, injury, impairment or physical or mental condition that involves: inpatient care in a hospital, hospice or residential health care facility; or continuing treatment or continuing supervision by a health care provider." Third, an Eligible Employee is entitled to paid leave when a child, parent, grandparent, grandchild, spouse, or domestic partner is on, or called to, active duty in the armed services of the United States and needs to engage in authorized activities or address certain events arising out of that service member's duty status. These authorized activities, known as "qualifying exigencies," are enumerated in the FMLA, 29 U.S.C.S. §2612(a)(1)(e), and 29 C.F.R. §825.126(b)(1)-(9) and include, among other things, attending official armed forces events, providing parental or child care on behalf of the service member, and making financial or legal arrangements for the service member.

What Documentation Must an Employer Prepare Once an Employee Requests Paid Leave?

Pursuant to PFL, "written notice and . . . proof of need for family leave shall be furnished to the employer by or on behalf of the employee claiming benefits." The employer, unless self-insured, presumably must then forward this notice and proof to the insurance carrier. However, the New York State Worker's Compensation Board has proposed regulations, currently subject to a 45 day public comment period ending April 8, 2017, to clarify any ambiguities in PFL. The New York State Government's website regarding PFL even provides guidance based on these proposed regulations. Unlike in the text of PFL, the proposed regulations provide that within three business days of receiving an employee's request to take paid leave, the employer must fill out the employer section of the "Request for Paid Family Leave" form (or comparable form provided by the insurance carrier or self-insured employer) and return the form to the employee. The employee must then forward the completed form along with any necessary certification or proof of claim (e.g. a birth certificate, certificate of adoption, healthcare certification, duty papers, etc.) to the employer's insurance carrier (or self-insured employer). If these proposed regulations are finalized, the employee and the insurance carrier, as opposed to the employer (unless a self-insured employer), will bear the primary burden of completing, filing, and communicating regarding any requests for paid leave.

How Much Time and Money Does an Employer Need to Give Its Employees?

As New York State is implementing PFL gradually, the amount of time and pay that an Eligible Employee will be entitled to receive will vary over the next four years. While an employer must give an Eligible Employee time off from work under PFL, as discussed below, the paid leave is funded by employee contributions – not by the employer – and the employer's insurance carrier is responsible for distributing payments during any such leave.

Starting on January 1, 2018, Eligible Employees will be entitled to 8 weeks of paid leave, receiving a maximum of 50% of their salary, which amount can be no more than 50% of the State's Average Weekly Wage. New York State's Average Weekly Wage is currently $1,296. Accordingly, the maximum weekly salary an employer will have to pay an Eligible Employee in 2018 is $648. Starting on January 1, 2019, Eligible Employees will be entitled to 10 weeks of paid leave,

receiving a maximum of 55% of their salary, which amount can be no more than 55% of the State's Average Weekly Wage. Starting on January 1, 2020, Eligible Employees will be entitled to 10 weeks of paid leave, receiving a maximum of 60% of their salary, which amount can be no more than 60% of the State's Average Weekly Wage. Starting on January 1, 2021 (and continuing thereafter), Eligible Employees will be entitled to 12 weeks of paid leave, receiving a maximum of 67% of their salary, which amount can be no more than 67% of the State's Average Weekly Wage.

Thus, for example, as of January 1, 2018, an Eligible Employee earning $1,000 per week will be entitled to $500 per week during each of the 8 weeks of leave. Meanwhile, an Eligible Employee earning $3,000 per week will only be entitled to $648 (50% of New York State's Average Weekly Wage) rather than $1,500 (50% of the employee's actual weekly wage) during each of the 8 weeks of leave.

How Will the Law Impact Employers?

The good news for employers is that PFL is *entirely employee-funded*. Beginning on or around July 1, 2017, employees will see a nominal deduction from their paycheck which funds will be used to finance the benefits afforded under PFL. Employees, with few exceptions, cannot opt out of the deduction. Employers will not need to make any direct financial contributions to subsidize PFL. Further, Eligible Employees must take any leave under PFL concurrently with leave taken under the FMLA. They cannot "stack" the benefits and take separate leave under each.

The bad news for employers is that PFL may dramatically increase business costs, especially for smaller companies, through the disruption it can cause on business operations. For example, Eligible Employees do not have to take paid leave under PFL consecutively. Rather, Eligible Employees can take their paid leave at any point during the 52 week period following the qualifying event (e.g. birth, adoption, foster placement, etc.) - which can cause serious operational disruptions to a business. Larger businesses previously subject to the FMLA may be familiar with the notion of intermittent leave; however, smaller businesses coming under the auspices of PFL are not only new to this concept but arguably are in a worse position to make necessary accommodations. Further, while PFL requires employees to give employers at least 30 days' notice before taking foreseeable leave, it only requires employees to provide notice "as soon as possible" before taking unforeseeable leave.

Employers should note that while Eligible Employees who take paid leave under PFL are not entitled to accrue seniority, vacation, sick or personal days, or employment benefits during such leave, they are entitled to reinstatement to the same job, or a comparable job, upon returning to work. Further, as a condition of an Eligible Employee's initial receipt of paid leave benefits, employers can permit, *but cannot require*, that Eligible Employees use accrued sick, vacation or personal days simultaneously with leave under PFL so that they can collect their full salary. An employer must maintain any existing health insurance coverage afforded to the employee's (or the employee's family's) during any period of paid leave. An employer cannot discriminate or retaliate against an employee who takes paid leave without being subject to legal ramifications.

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How Should New York Employers Prepare Now?

New York employers should consider doing the following to prepare for PFL:

1. Revise internal rules, handbooks, posted notices, and employment agreements to include information concerning leave and employee obligations under PFL;
2. Obtain PFL coverage under an existing or new insurance policy (or self-insure). Where a PFL insurance policy premium must be paid prior to January 1, 2018, employers can collect contributions from employees to cover the cost. Employers should note that insurance carriers are not required to offer PFL coverage so they may need to research and secure a policy with a new carrier;
3. Submit comments to the New York State Worker's Compensation Board regarding the proposed regulations before the public comment period ends on April 8, 2017;
4. Communicate with an attorney regarding finalized regulations issued by the New York State Worker's Compensation Board. The final regulations will be informative and instructive to employers;
5. Identify resources to find short-term assistance with limited notice (e.g. recruiters, websites, etc.) to quickly adapt when Eligible Employees take paid leave, especially unforeseeable paid leave; and
6. Engage in cross training and/or budget planning to account for absences and ensure smooth transitions while Eligible Employees are out on paid leave.

The enactment and implementation of PFL will require many employers to revise their current employment contracts, prepare new employment contracts for temporary hires filling-in for employees on leave, update internal handbooks and policies, take affirmative steps to inform employees about new terms and policies, and identify third party resources (e.g. insurance companies, recruiters) to ensure compliance and smooth business operations in the months and years to come. MH&H is here to assist you in connection with any and all of the foregoing.

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